No. 86-198

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

EDWARD A. HAFFER,
PETITIONER

v.

ACTION MANUFACTURING, INC.,
FAIRHAVEN TEXTILE CORPORATION,
AND BRAWER BROS., INC.,
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Questions Presented

1. In requiring that a defendant's counsel automatically notify the plaintiff of any anticipation that the plaintiff will fail to prove an element of its case, has a Federal Court of Appeals contravened certain provisions of the Federal Rules of Civil Procedure and the work-product doctrine, and brought Fed. R. Civ. P. 16 into conflict with that doctrine?

2. When counsel's conduct complied with the Federal Rules of Civil Procedure and was otherwise well grounded in fact and law, did the Court of Appeals exceed its authority under 28 U.S.C. § 1927 in punishing him for not anticipating its automatic-notification rule?

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A. Neither Rule 8(c) nor Rule 15(a) required the defendant to notify the plaintiff of the anticipated failure of proof. These rules are vitiated by the Court's new requirement of automatic notification. 8

B. Rule 16, as properly applied by the District Court in its discretion, did not require the defendant to specifically notify the plaintiff of the anticipated failure of proof. This proper application of the rule is vitiated by the Court of Appeals' new requirement of automatic notification. Moreover, through that requirement, the Court of Appeals has usurped the discretion of the District Court in the management of pretrial proceedings. 9

C. Neither Rule 15(b) nor principles of orthodox trial practice required the defendant to notify the plaintiff of the anticipated failure of proof. This rule and these principles are vitiated by the Court's new requirement of automatic notification. 12

D. The Court's new requirement of automatic notification contravenes the work-product doctrine of *Hickman v. Taylor*, and brings Rule 15 into conflict with that doctrine. 16

II. When counsel's conduct fully complied with the Federal Rules of Civil Procedure and was otherwise well grounded in fact and law, the Court of Appeals exceeded its authority under 28 U.S.C. § 1927 in punishing him for not anticipating its automatic-notification rule. The decision constitutes a grave miscarriage of justice, calling for guidlines that protect against the punishment of responsible advocacy, and calling also for an exercise of this Court's power of supervision. 20

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The petitioner Edward A. Haffer respectfully prays that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the First Circuit, described below.

Opinions Below

The two opinions of the Court of Appeals for the First Circuit are reported as *Action Mfg., Inc. v. Fairhaven Textile Corp. et al.*, 790 F.2d 164 (1st Cir. 1986), and appear in the Appendix (A. 9, 14). The decision of the United States District Court for the District of New Hampshire is not generally reported, but appears in the Appendix (A. 19).

Jurisdiction

The judgment of the Court of Appeals on rehearing was dated and entered on May 14, 1986. The original judgment was dated and entered on February 20, 1986. It is believed that this Court has jurisdiction to review under 28 U.S.C. § 1254(1). If, however, it is determined that the petitioner is not a "party" for purposes of 28 U.S.C. § 1254(1), then he respectfully requests that this be treated as a petition for a common-law writ of certiorari under 28 U.S.C. § 1651(a) and Sup. Ct. R. 26 and 27.4.

Constitutional Provisions, Statutes, and Rules Involved

This case involves the due process clause of the Fifth Amendment; 28 U.S.C. §§ 1927 and 2072; Fed. R. Civ. P. 8(c), 15(a), 15(b), and 16; Local Rule 10(b) (D.C.N.H. 1980); and N.H. Rev. Stat. Ann. 382-A:2-607(3)(a), 2-612(1), and 2-714(1). Being lengthy, these provisions are set forth in the Appendix (A. 1).

Statement of the Case

Pre-Appeal

Counsel (Haffer) represented a defendant (Fairhaven) in an action for breach of a contract for shipments of nylon to the plaintiff

(Action). Action brought suit before the United States District Court for the District of New Hampshire, based on diversity jurisdiction. 28 U.S.C. § 1332. Action was a New Hampshire citizen; Fairhaven was a New Jersey citizen; and the matter in controversy exceeded $10,000. The case arose under Article 2 of N.H. Rev. Stat. Ann. 382-A, New Hampshire's enactment of the Uniform Commercial Code. To recover damages on accepted goods under Article 2, a "buyer must within a reasonable time after he discovers or should have discovered *any* breach notify the seller of breach or be barred from *any* remedy." N.H. Rev. Stat. Ann. 382-A: 2-607(3)(a) (A. 8, emphasis added); see also N.H. Rev. Stat. Ann. 382-A:2-714(1) (A. 8).

Without suggestion by the District Court or any party, the Court of Appeals held that counsel had violated the Federal Rules of Civil Procedure by the manner in which he had raised the issue of timely notice at trial. For appealing the District Court's ruling on the merits of timely notice, counsel was fined and censured under 28 U.S.C. § 1927 (A. 1).

Counsel, obviously, does not ask this Court to decide the merits of the Article 2 issues raised below. However, for the Court to assess his procedural and trial conduct in light of the Federal Rules of Civil Procedure and the work-product doctrine, it is crucial first to understand the position he took on the merits. The case involved *one contract* calling for several shipments; it did *not* involve a series of separate contracts. Action's Complaint itself alleged one contract calling for several shipments (A. 53); and even in the absence of such an allegation, the several shipments would have been deemed to be under one contract by operation of N.H. Rev. Stat. Ann. 382-A:2-612(1) (installment contract) (A. 8) (n.b. Comments 2 and 3 to that section).

As the cases and commentary explain, the policy underlying the requirement of timely notice of breach is to allow the seller to take corrective steps as soon as possible, and thus avert later breaches and accumulation of damages. In light of this policy, the statutory requirement of timely notice meant, in counsel's view, timely notice of the *earliest breach of the contract, i.e.*, the earliest breach

which the buyer discovered or should have discovered. Counsel's further reasoning, based on the same cases and commentary, was that failure to give timely notice of the earliest breach would bar "any" remedy *even if* there had been timely notice on a later breach, viewed in isolation. Thus, he reasoned, the statutes did not permit the buyer to fragment a single contract into its several parts, selecting for remedy those shipments on which he had given timely notice of breach, and waiving remedy for those shipments on which he had given no timely notice.

The Complaint specifically confined the claim of breach to nylon shipped in the summer and fall (collectively, the fall breach). Action based its claim on *fall* returns by Action customers of defective Action products that had been made with Fairhaven nylon. The Complaint alleged, and the Answer admitted, timely notice of the *fall breach of the contract.* No other breach was pleaded.

More than two years later, Action answered an interrogatory by claiming damages from an earlier, *spring breach of the same contract.* Action based this claim on *spring* returns by Action customers of defective Action products that had been made with Fairhaven nylon. No timely notice of the spring breach had been given to Fairhaven—indeed, no notice at all, until Action's response to the interrogatory. Because the spring breach was the *earliest breach of the contract,* and because Action had failed to give timely notice of it, counsel's position was that under the statutes Action should be barred from "any" remedy. Moreover, in light of the spring breach, counsel's admission of timely notice of the fall breach had become immaterial.

Action did not amend its Complaint to refer to the spring breach. Fairhaven, therefore, did not amend its Answer. The Complaint and Answer thus remained confined to the fall breach of the contract.

Action, Fairhaven, and the third-party defendant (Brawer Bros.) filed Pretrial Statements simultaneously, shortly after Action's response to the interrogatory. *All* parties followed the same format: specifying uncontested facts, and then stating that all facts not specified as uncontested were contested. *No* party specified timely notice as uncontested. Thus it was a contested fact for trial. No party

objected to this procedure; all parties relied on it; and the District Court permitted it. The District Court's Final Pretrial Order dealt with the facts by giving a virtually verbatim restatement of Fairhaven's specification of uncontested facts. (A. 85, containing the Pretrial Statements and Order.)

At trial, both Action and Fairhaven put in evidence of the spring breach of the contract. No evidence, however, was offered of notice of the spring breach, since in fact no notice had been given. In closing argument, Fairhaven's counsel contended that Action had failed to prove an element of its case, namely, timely notice of the spring breach, the earliest breach of the contract. Action did not object to his arguments.

The District Court judge, who had entered the Final Pretrial Order and had seen and heard all the evidence and all the arguments, closed the trial saying:

> I'd just like to make one comment before I leave the bench. And I'm sorry Mr. Brawer isn't here.
>
> And that is, that I commented during the trial in chambers to my personnel that this case has been very well tried by all parties. Counsel did a lot of work and it's a very intricate, difficult case to decide, you know that, but you made it a lot easier by the way you presented it and the time you put into it, the exhibits, the way everything went in, and you're to be commended.

In post-trial filings, Action did not object to Fairhaven's Answer or Pretrial Statement or the trial tactics of Fairhaven's counsel. Nor were these matters criticized by the District Court. The Court ruled against Fairhaven on the merits of timely notice, and gave judgment for Action (A. 46, 48).

Appeal — First Opinion

Fairhaven appealed to the Court of Appeals for the First Circuit, making essentially the same argument on notice that it had made below. Action responded to the argument strictly on the merits. It did *not* contend that Fairhaven had admitted notice, either in its Answer or in its Pretrial Statement or in anything

else. A judge of the Court of Appeals, however, raised the question of admission for the first time during oral argument, by questions to Fairhaven's counsel. In his attempts to answer, counsel was repeatedly interrupted (A. 65-67).

In its first opinion (A. 14), written by the questioning judge, the Court of Appeals censured counsel for appealing the issue of timely notice, and required him to pay $2,000 in attorneys' fees, citing 28 U.S.C. § 1927 (A. 16). Counsel had received no prior notice that he would be subject to punishment; the opinion itself was his first notice of charges. It described his conduct as a "conspicuous example of improper advocacy," an "unabashed piece of sharpness," and an "imposition on appellee and the court" (A. 15-16); it called the sanctions "punitive" (A. 18).

In a Verified Petition For Rehearing En Banc (A. 52), counsel gave a detailed exposition of the facts, the law, and his own good faith. Counsel explained his position on burden of proof, nonamendment of Fairhaven's Answer, and trial of issues by the implied consent of all parties (A. 56-58). He explained that the Court had mistakenly read the Answer's limited admission of notice of the fall breach as an unlimited admission, extending also to the previous spring breach (A. 53-61). He also pointed out that Fairhaven's Pretrial Statement had *not* included notice in the specification of uncontested facts, but had included it under contested facts, through the statement, "All other facts are contested" (A. 56).

Appeal — Second Opinion

In the second opinion (A. 9), the original panel, writing per curiam, acknowledged counsel's position that the scope of the pleadings was limited to the fall breach. However, it refused to withdraw the punishment. Instead, it revised its rationale, stating two new grounds. One was procedural, and the other was substantive; both are described in detail in Reasons for Granting the Writ.

Otherwise, the Court neither answered nor revealed counsel's explanation in his Verified Petition. The Court said that counsel's procedural position was "outlawed" (A. 12). It said that his position on the merits was "extraordinary," on its view that, "[t]he spring goods, and the fall goods, were separate orders, and separate shipments" (A. 11). Calling counsel's overall position "[a]t the least . . . frivolous" (A. 12), it let the original opinion and punishment stand. The requests for rehearing and for en banc review were denied (A. 13).

Reasons for Granting the Writ

I. In Requiring that a Defendant's Counsel Automatically Notify the Plaintiff of any Anticipation that the Plaintiff Will Fail to Prove an Element of Its Case, the Court of Appeals Has Contravened Certain Provisions of the Federal Rules of Civil Procedure and the Work-Product Doctrine. The Decision Is In Conflict with the Rules Prescribed by This Court Under 28 U.S.C. § 2072; Is In Conflict with *Hickman v. Taylor*, 329 U.S. 495 (1947); and Presents an Important, Unresolved Question on the Application of the Work-Product Doctrine to Fed. R. Civ. P. 16.

The Court's first opinion was grounded on an overbroad and incorrect reading of the pleadings. The result was the misconception that Fairhaven had admitted timely notice of the spring breach in its Answer, and had then taken a contrary position at trial and on appeal. On that basis, counsel was punished. Although in its second opinion the Court acknowledged that the pleadings were confined to the fall breach, it refused to withdraw the punishment. Instead, it revised its rationale, introducing what it called the "universal principle," which it described as follows:

> As a general principle the presentation of claims beyond the complaint without objection is considered an informal amendment of the complaint. See *Lynch v. Dukakis*, 719 F.2d 504, 508 (1st Cir. 1983); F.R. Civ. P. 15(b). In the absence of notice

> to the contrary it may be assumed that the defendant does not choose to amend its answer. Anything else would be inconsistent with the universal principle that the issues in the case are to be made known in advance.[1] [A. 11.]

As that principle was applied here — absolutely, and without regard to differing rules and competing values — it was unprecedented and unsupportable. Its application translated into a new basis for counsel's punishment: his failure to step forward and notify Action of his anticipation that Action would fail to prove timely notice of a claim "beyond the complaint," *i.e.*, a claim of damages from the spring breach, the earliest breach of the contract.

As is explained in this Argument, no such duty exists under the Federal Rules of Civil Procedure, with which counsel fully complied. In fact, the Court's radical departure from established procedure vitiates the following rules (A. 2-6):

1. Fed. R. Civ. P. 8(c), by requiring that an element of the plaintiff's cause of action be raised by the defendant as if it were an affirmative defense;

2. Fed. R. Civ. P. 15(a), by requiring that the defendant give a particularized answer to an averment of fact that was neither pleaded originally nor pleaded by amendment;

3. Fed. R. Civ. P. 16, by usurping the discretion of the District Court in the management of pretrial proceedings — more spe-

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[1] The "universal principle" is addressed throughout this Argument, but brief comment should be made on the two sentences which precede and introduce it. Setting aside the looseness of the Court's generalizations, neither they nor *Lynch* have any application to the Answer here. As is explained in this Argument, Action did not amend its Complaint under Rule 15(a); and notice was not an affirmative defense under Rule 8(c). Fairhaven therefore had no duty to amend its Answer, which was limited to the fall breach. See *infra* pp. 8-9. Though the Court cites Rule 15(b), it misapplies it. See *infra* pp. 12-14. Likewise, the Court misapplies *Lynch*, which involved an attempt by plaintiffs to add a claim under a different statute from the one pleaded in their Complaint.

cifically, by rejecting pretrial procedures which the District Court had permitted, which all parties had followed, and on which all parties had relied; and

4. Fed. R. Civ. P. 15(b), by permitting the plaintiff to try an unpleaded claim for damages without having to prove an element of that claim.

The Court's "universal principle" also contravenes the work-product doctrine of *Hickman v. Taylor*, 329 U.S. 495 (1947), which shields a lawyer's "mental impressions," "legal theories," and "strategy" from "undue" disclosure. *Id.* at 511. As is explained below, though *Hickman* involved the discovery rules (Rules 26 *et seq.*), its logic permeates the entire adversary system, encompassing every aspect of the lawyer's role before and during the trial. Part of that role, of course, involves Rule 16; and the Court's application of the "universal principle" to that rule brings it into conflict with *Hickman*.

A. *Neither Rule 8(c) nor Rule 15(a) required the defendant to notify the plaintiff of the anticipated failure of proof. These rules are vitiated by the Court's new requirement of automatic notification.*

Rule 8(c) requires a defendant to "set forth affirmatively . . . any . . . matter constituting an avoidance or affirmative defense" (A. 2).

> Notification under section 2-607 [of Article 2] is an integral part of a *buyer's* cause of action and is *not* an affirmative defense of the *seller*. Therefore, the *buyer* must both plead and prove that the notice requirement has been complied with.

Eastern Airlines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957, 970 n.31 (5th Cir. 1976) (emphasis added). *Royal Typewriter Co. v. Xerographic Supplies*, 719 F.2d 1092, 1102 (11th Cir. 1983); *K & M Joint Venture v. Smith International, Inc.*, 669 F.2d 1106, 1111 (6th Cir. 1982); *Standard Alliance Ind. v. Black Clawson Co.*, 587

F.2d 813, 823 (6th Cir. 1978), *cert. denied*, 441 U.S. 923 (1979) — all cited by counsel to the Court of Appeals. Since notice under Article 2 is not a matter of affirmative defense, Fairhaven had no duty under Rule 8(c) to step forward and plead it.

Rule 15(a) requires a party to "plead in *response* to an *amended pleading* ... within 10 days after *service* of the *amended pleading*" (A. 2, emphasis added). See 6 C. Wright & A. Miller, Federal Practice and Procedure § 1475, pp. 387-89 (1971 ed.); and 3 J. Moore, Federal Practice ¶¶ 15.07[1] and [2], pp. 15-29 through 15-43 (1985 ed.). Rule 7(a) defines "pleading" to be a complaint, an answer, a reply to a counterclaim, an answer to a cross-claim, a third-party complaint, and a third-party answer. An answer to interrogatory, such as the one in which Action claimed damages on the spring breach, is not a "pleading." See 5 C. Wright & A. Miller, *supra*, at § 1183, pp. 13-15 (1969 ed.); and see 2A J. Moore, *supra*, at ¶ 7.02, pp. 7-7 through 7-8 (1985 ed.). Since Action had not amended its Complaint to make a claim for relief on the spring breach or even to refer to that breach, Fairhaven had no duty to amend its Answer, which was specifically confined to the fall breach. See also *infra* p. 13.

See Argument II for the facts on counsel's arguments to the Court of Appeals on burden of proof and nonamendment of Fairhaven's Answer, and the Court's silent rejection of those arguments.

B. *Rule 16, as properly applied by the District Court in its discretion, did not require the defendant to specifically notify the plaintiff of the anticipated failure of proof. This proper application of the rule is vitiated by the Court of Appeals' new requirement of automatic notification. Moreover, through that requirement, the Court of Appeals has usurped the discretion of the District Court in the management of pretrial proceedings.*

"Pretrial procedure is optional with the particular district court, inasmuch as Rule 16 is permissive in terms." 3 J. Moore, *supra*,

at ¶ 16.06, p. 16-27 (1985 ed.). The District Court in this case permitted the pretrial procedure which all parties had followed and on which all parties had relied. See Local Rule 10(b) (D.C.N.H. 1980) (A. 6) and Rule 16 (1938, before the 1983 amendments) (A. 3). The version of Rule 16 then existing — which the Pretrial Statements contemplated — provided for the District Court to make an order "which limits the issues for trial to those *not disposed of by admissions or agreements of counsel.*"[2] (Emphasis added.) Here, notice on the spring breach had clearly *not* been disposed of by any admissions or agreements of counsel. On that basis alone, notice was to be an issue for trial. Furthermore, when in the Pretrial Statements *no* party had included notice in its specification of uncontested facts and *all* parties had made the general statement that all other facts were contested, notice was, unquestionably, contested.[3] If Action did not understand that point, then it did not understand either the elements of its own cause of action, which it had been litigating for almost three years, or the significance of its own Pretrial Statement.[4]

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[2] The Pretrial Statements were submitted by all parties on March 28, 1983. Rule 16 was amended on April 28, 1983 (A. 4), and the amendment took effect on August 1, 1983. The District Court entered its Final Pretrial Order on August 8, 1983. The amendment did not substantially change the part of the original rule dealing with pretrial orders, although it did delete the specific language quoted in the text. See the Notes of Advisory Committee on Rules for the 1983 Amendment of Rule 16(e); and see 6 C. Wright & A. Miller, *supra*, at § 1526, p. 297 (1986 pocketpart) (1971 ed.).

[3] Notice was, moreover, indeed an issue of fact. "Whether proper notice was given is a question of *fact*." *Standard Alliance*, 587 F.2d at 823 (emphasis added). *Royal Typewriter*, 719 F.2d at 1102; *Mariner Water, Etc. v. Aqua Purification, Etc.*, 665 F.2d 1066, 1069 (D.C. Cir. 1981); *Eastern Airlines*, 532 F.2d at 973.

[4] In the section of Fairhaven's Pretrial Statement on "Disputed Issues of Law," Fairhaven said, "*Other than obvious disagreement over whether the evidence supports the various claims*, Fairhaven is not aware of any disputed issues of law" (emphasis added). As already noted, Sections 2-714(1) and 2-607(3)(a) required Action to prove proper notice; without such evidence, Action simply could not support its claim for damages. The point was, literally, elementary — or at least should have been, to a plaintiff that had been litigating a damages claim rooted in Section 2-714(1).

In the briefs to the Court of Appeals, no party argued that there had been any deficiency in the Pretrial Statements (or the Answer).[5] Action did *not* contend that Fairhaven could not appeal notice; *nor* did it contend that Fairhaven had admitted it, either in its Answer or in its Pretrial Statement or in anything else. Rather, Action dealt with notice on the merits.

The first challenge to Fairhaven's Pretrial Statement (and Answer) occurred without forewarning at the start of oral argument by Fairhaven's counsel. In response to questioning by a judge, counsel correctly stated that the Pretrial Statement had not *specifically* raised notice. The judge indicated that notice had to be specified in the Pretrial Statement before it could be contested at trial. He said that "the court looks at a pretrial memorandum. I've sat on the district court off and on for 30 years and I shall continue to do it that same way and so do all district judges" (A. 66). The statement reflects a fundamental confusion between the province of a District Court judge and that of a Court of Appeals judge. See Rules 16 and 83 (A. 3-6). Under Rule 16, the District Court judge here had the power (1) to order all parties to recite specifically which facts they were going to contest, and (2) to preclude them from raising at trial any fact that had not been specifically recited — assuming, however, no violation of *Hickman v. Taylor*.[6] "If the *pretrial judge* decides the pretrial

[5] Fairhaven's brief cited the Court to statutes, commentary, and cases in support of its contentions on notice (A. 68-76). The first case it cited was *Standard Alliance*, 587 F.2d 813, which in addition to holding "[w]hether proper notice was given is a question of fact" (at 823), also holds, "*If the evidence is clear*, however, a court can rule as a matter of law that a party failed to give proper notice." *Id.* (emphasis added). *Cf. Celotex Corp. v. Catrett*, 54 U.S.L.W. 4775, 4777 (1986) (applying the same principle in the context of Rule 56). Arguing that the evidence here was indeed clear, Fairhaven asked the Court to rule as a matter of law that Action had failed to give proper notice.

[6] Though any such order would have to be obeyed (see Rule 16(f), authorizing the District Court to impose sanctions), an objection could be taken to the extent the order infringed interests protected under *Hickman v. Taylor*. Here, however, the District Court did *not* enter such an order. The pretrial procedure actually employed — again, without objection — therefore raised no issue whatever under *Hickman v. Taylor*.

memorandum [filed by any party] is not sufficiently informative he may require a new statement to be filed." 6 C. Wright & A. Miller, *supra*, at § 1527, p. 614 (emphasis added). Here, however, the pretrial judge (who was also the trial judge) made no such order.

Moreover, Fairhaven reasonably relied on the procedure that had been actually permitted — as did the other two parties, who had proceeded exactly as Fairhaven had. Though the Court of Appeals judge has evidently required a different procedure in his sittings as a District Court judge, his is not the universal way. "The district courts have adopted a variety of local rules, standardized forms, and practices with regard to pretrial procedures, reflecting continuing differences of view as to the purposes of pretrial and the optimum conditions for its use. Generalization about procedures is therefore hazardous." 3 J. Moore, *supra*, at ¶ 16.09, p. 16-32 (1985 ed.). See also Rule 83. Furthermore, at no point — not even on appeal — did any party, including Action, object either to the pretrial procedure employed in this case or to any pretrial statement submitted. There was, therefore, absolutely no pretrial issue before the Court of Appeals. By raising the issue on its own motion, moreover, the Court overlooked the principle that "the best way to insure an effective pretrial conference system is to keep appellate interference to a minimum." 6 C. Wright & A. Miller, *supra*, at § 1526, p. 599 (1971 ed.).

See Argument II for the facts on counsel's arguments to the Court of Appeals on Fairhaven's Pretrial Statement, and the Court's silent rejection of those arguments.

C. *Neither Rule 15(b) nor principles of orthodox trial practice required the defendant to notify the plaintiff of the anticipated failure of proof. This rule and these principles are vitiated by the Court's new requirement of automatic notification.*

Rule 15(b) provides, "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be

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However, through the usurpation of the District Court's role under Rule 16, the Court of Appeals has created a conflict between Rule 16 and *Hickman v. Taylor*. See *infra* p. 19.

treated in all respects as if they had been raised in the pleadings" (A. 2). Given Action's answer to interrogatory, Fairhaven's counsel expected that at trial Action would offer evidence of damages from the spring breach. Under Rule 15(b), he intended to consent to the trial of that breach. He believed that trial on spring-breach damages would, *ipso facto*, mean trial on spring-breach notice — notice which he had not admitted, and which he knew Action could not prove. The correctness of his belief is confirmed by a review of the elements of the root statute for Action's claim for damages, Section 2-714(1) (A. 8), and also the elements of its companion statute, Section 2-607(3)(a) (A. 8). As already noted, the statutes connect notice and remedy inextricably; they make the one intrinsic to the other: a buyer may have no remedy unless it proves proper notice. It was, therefore, unthinkable that Rule 15(b) consent would be applied in such a way as to amputate notice from remedy, *i.e.*, to let Action claim spring-breach damages without having to prove the contested fact of spring-breach notice.[7] Counsel has since searched for and found no case allowing such an escape from burden of proof. See generally 3 J. Moore, *supra*, at ¶¶ 15.13 and 15.14, pp. 15-118 through 15-139 (1985 ed.) and the cases there collected; and 6 C. Wright & A. Miller, *supra*, at §§ 1491, 1493, pp. 453-56, 460-74 (1971 ed.) and the cases there collected. See also Rule 1 (requiring that the rules be construed to secure "just" determinations). Cf. *Brandon v. Holt*, 469 U.S. 464 (1985).

By the context in which the Court cites Rule 15(b) (see *supra* pp. 6-7), it suggests that, although the plaintiff is free to present claims "beyond the complaint," the defendant has a duty to "amend its answer" in anticipation of trial of those claims. Rule 15(b), however, imposes no such duty, let alone a duty to do so before trial. The rule provides:

> Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these

[7] Given the spring returns and the spring credits (described *infra* p. 14), counsel believed that at the very least Action "should have discovered" the spring breach. See N.H. Rev. Stat. Ann. 382-A:2-607(3)(a) and 2-714(1) (A. 8).

> [unpleaded] issues may be made upon motion of any party at any time, *even after judgment*; but failure to so amend does *not* affect the result of the trial of these issues. [A. 2, emphasis added.]

When at trial Action offered into evidence a business record of spring credits to Action customers who had returned defective products made with Fairhaven material, Fairhaven did not object. It thereby consented under Rule 15(b) to try Action's unpleaded claim. Fairhaven's counsel cross-examined Action's president on the business record, and on Action's answer to interrogatory claiming damages on the spring breach. All this was done without objection.

Consistent with orthodox trial practice, counsel did not, however, inquire about notice on the spring breach. He knew that in fact there had been none, as Action itself would concede on appeal. He also had two other points in mind: (1) notice was a fact on which Action, not Fairhaven, had the burden of proof; and (2) he feared eliciting false evidence. The fear was genuine and substantial. Another exhibit admitted into evidence was a 1979 Report of the Master of the Suffolk County (Mass.) Superior Court in a suit brought against Action's president by his former employer. The Master found among other things that the president had: (1) *caused a false invoice to be placed in evidence, unbeknownst to his counsel*; (2) directed the payment of bribes or kickbacks; (3) lied to his former employer; (4) given completely incredible testimony; and (5) committed at least thirteen separate breaches of fiduciary duty.

Fairhaven's counsel had a duty to his own client to cross-examine this dangerous witness with care. In inquiring about the spring damages without referring to notice, counsel followed trial techniques advocated in 3 I. Goldstein & F. Lane, Trial Techniques ch. 19 (2d ed. 1969). The Goldstein treatise has been called "a classic." H. J. Stern, Winning Trial Advocacy and Techniques, p. 66 (1986). Counsel adhered to the following "cardinal principles of cross-examination" urged in Goldstein: "Keep your objective hidden"; "Avoid too broad cross-examination"; "Leave well enough alone"; "Closing argument may be [the] most important part of cross-examination." See 3 I. Goldstein & F. Lane, *supra*, at §§

19.17-19.20, pp. 25-29. These principles are repeated throughout the literature on trial technique. See, e.g., I. Younger, The Art of Cross-Examination (A.B.A. Litigation Monograph Series, 1976) ("Disallow witness explanation"; "Limit questioning"; "Save for summation," pp. 28-32); and J. L. Kestler, Questioning Techniques and Tactics (1982) ("Know when to quit"; "Do not telegraph the punch," pp. 29-31). To have ignored these rules with any witness would have been imprudent. To have ignored them with the witness here, given his history, could have amounted to malpractice. Though the Court of Appeals was to excoriate counsel for not specifically mentioning notice until closing, he followed the rules and discharged his duties. He should not as a consequence have been punished. As Judge Stern says:

> [D]on't attack the lawyers for doing what the rules allow. If you don't like the rules, change them. But until you do, a lawyer has an absolute duty to do everything for the client that is permitted to be done — and no one has the right to try to frighten the lawyer into giving anything less.

H. J. Stern, *supra*, at p. 21 (1986).

Counsel saved his point on notice for summation. He argued that under Section 2-607(3)(a), "Action is barred from any remedy, because it did not give notice as it had to within a reasonable time after it discovered or should have discovered there was a problem with Fairhaven's goods." He pointed out that "no notice was sent to Fairhaven until sometime after September 17," even though June "was when [Action] customers started returning the defective products" and started receiving the Action credits. Action's counsel neither objected to the argument nor requested a continuance. See Rule 15(b); see also, e.g., *George Cohen Sons & Company v. Koch*, 376 F.2d 629, 632-33 (1st Cir. 1967).

In Fairhaven's post-trial filings, it asked the Court to find as a matter of fact that Action had given no notice on the spring breach, and to rule as a matter of law that under Section 2-607(3)(a) Action's failure barred "any" remedy. In Action's post-trial filing, it expressly requested damages not only on the fall

breach, but also on the spring breach. Action made no objection to Fairhaven's Answer, Pretrial Statement, or trial tactics. The District Court, in rejecting Fairhaven's contentions on the merits, did not criticize Fairhaven's Answer, Pretrial Statement, or trial tactics. In fact, as noted previously, the Court had closed the trial commending all counsel for their conduct.

See Argument II for the facts on counsel's arguments to the Court of Appeals on trial by implied consent, and the Court of Appeals' silent rejection of those arguments.

D. *The Court's new requirement of automatic notification contravenes the work-product doctrine of Hickman v. Taylor, and brings Rule 16 into conflict with that doctrine.*

This Court in *Hickman* recognized the high place of notice in the pretrial process. However, it also recognized the existence of competing values and the resulting need to balance. Referring not only to the discovery rules, but also to Rule 16, it said: "[C]ivil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial." 329 U.S. at 501. The Court's very articulation of the notice principle, however, acknowledges that it is not absolute. Moreover, referring on the one hand to "unwarranted excursions into the privacy of a man's work," and on the other to the "public policy support[ing] reasonable and necessary inquiries," the Court concluded: "Properly to balance these competing interests is a delicate and difficult task." 329 U.S. at 497.

Under *Hickman*, a lawyer may

> prepare his *legal theories* and plan his *strategy* without undue and needless interference. That is the historical and necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in . . . *mental impressions, personal beliefs,* and *countless other*

> tangible and *intangible ways* — aptly though roughly termed . . . the "Work product of the lawyer." Were such materials open to opposing counsel on mere demand [or, here, by automatic notification], much of what is now put down in writing would remain unwritten. *An attorney's thoughts, heretofore inviolate, would not be his own.* Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

329 U.S. 511 (emphasis added).

The work-product doctrine is now reflected in part in Rule 26(b)(3). That rule permits discovery of documents and tangible things prepared in anticipation of litigation, but only upon a showing of substantial need and undue hardship. When the court is satisfied that such a showing has been made, it nevertheless "*shall* protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney . . ." (emphasis added). See generally 4 J. Moore, *supra*, at ¶ 26.64[1], pp. 26-348 through 26-351; ¶ 26.64 [3-2], pp. 26-382 through 26-389 (1984 ed.); and 8 C. Wright & A. Miller, *supra*, at § 2023, pp. 190-96; § 2026, pp. 229-32 (1970 ed.).

The Court of Appeals' new doctrine obliterates the public policy originally announced in *Hickman* and now reflected in part in Rule 26(b)(3). First, it requires automatic notification of any anticipation of an opponent's failure of proof, even in the absence of any request for information by the opponent. Second, it requires such automatic notification even in the absence of any showing of substantial need or undue hardship. That showing, significantly, could never have been made here, since: (a) the fact of the spring damages had always been known by Action; (b) it was Fairhaven, not Action, that needed discovery to learn of that fact; and (c) the fact bore on a legal point that was, literally, elementary — the statutory requirement that a buyer prove timely notice in its claim for damages. Finally, the automatic-notification rule requires the very disclosure of which *Hickman* disapproves, and against which

Rule 26(b)(3) commands protection, *i.e.*, "disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney."[8] See *F.T.C. v. Grolier, Inc.*, 462 U.S. 19 (1983); *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981); and *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730 (4th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975) (in which the Fourth Circuit construed the rule as conferring "absolute immunity" (at 734) on an attorney's mental impressions).

Unlike Rule 26(b)(3), *Hickman* does not confine its protection to the mental impressions of a lawyer that are reflected in documents and tangible things. Though it is true that *Hickman* did involve the discovery rules (Rules 26 *et seq.*), its logic has wider application. Significantly, the Court in *Hickman* specifically likened the discovery rules to Rule 16. 329 U.S. at 501. Even more generally and fundamentally, however, *Hickman* applies to the adversary system itself, in its entirety. Mr. Justice Jackson made the point explicit in his concurring opinion: "[T]rial is and always should be an adversary proceeding. [The Federal Rules of Civil Procedure] were hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary." 329 U.S. at 516. See *Duplan*, 509 F.2d at 734.

This case demonstrates a need to say what should be obvious: the adversary system of jurisprudence imposes a duty on counsel to *be* an adversary. He breaches that duty if, without lawful compulsion and contrary to his own client's interests, he aids and teaches his adversary. Such gratuitous instruction could be malpractice. Though the Court of Appeals now compels that result through the "universal principle," the compulsion is unlawful. It is unlawful because it is a usurpation of the province of this Court to

[8] The Notes of Advisory Committee on Rules for the 1970 Amendment of Rule 26(b)(3) indicate that under Rules 33 (interrogatories) and 36 (requests for admissions), "a party and his attorney . . . *may* be required to disclose, *to some extent*, mental impressions, opinions, or conclusions" (emphasis added). But see *Duplan*, 509 F.2d 730 (cited in full, above, in the text).

prescribe the rules of civil procedure. 28 U.S.C. § 2072 (A. 1). What this Court said in *Miner v. Atlass*, 363 U.S. 641, 649-50 (1960), in the context of rejecting certain local admiralty rules, applies with no less force to the Court of Appeals' automatic-notification rule:

> [T]he matter is one which, though concededly "procedural," may be of as great importance to litigants as many a "substantive" doctrine, and which arises in a field of federal jurisdiction where nationwide uniformity has traditionally always been highly esteemed.
>
> The problem then is one which peculiarly calls for exacting observance of the statutory procedures surrounding the rule-making powers of the Court, . . . designed to insure that basic procedural innovations shall be introduced only after mature consideration of informed opinion from all relevant quarters with all the opportunities for comprehensive and integrated treatment which such consideration affords.

Application of the Court's automatic-notification requirement to Rule 16 brings that rule into conflict with *Hickman*: when any counsel on filing a pretrial statement anticipates that an opponent will fail to prove an element of its case, counsel will be automatically required to say so. It makes no sense, however, to protect a lawyer's mental impressions and strategy in the context of discovery and then to require their revelation in the context of pretrial proceedings. Though the Court neither cited Rule 16 itself nor the Notes on the Advisory Committee on Rules for the 1983 Amendment of Rule 16, it in essence misapplied the following statement of the Committee concerning Rule 16(c): "Counsel bear a substantial responsibility for assisting the court in identifying the factual issues worthy of trial. If counsel fail to identify an issue for the court, the right to have the issue tried is waived." It cannot be presumed, however, that the Advisory Committee intended its statement to be applied in derogation of the balancing requirement laid down in *Hickman*. Nothing in Rule 16 itself suggests such a result. Nothing in the rule suggests that a defendant's counsel may be forced into a position where he either (1) must

waive an issue which he does not have the burden to prove, or (2) must divulge his mental impressions and strategy concerning the plaintiff's prospective failure of proof. Any obligation to identify an issue should be on the party who has the burden to prove it. Alternatively, the balance between notice and protection of work product may be struck as it was actually struck here: where the District Court permitted the parties to specify uncontested facts, and then state that all other facts were contested. See *supra* pp. 3 and 10.

Finally, when the Court in *Hickman* likened Rule 16 to the discovery rules (329 U.S. at 501), it strongly signalled that the following statement should also apply to Rule 16:

> When Rule 26 and the other discovery rules were adopted, this Court and the members of the bar in general certainly did not believe or contemplate that all the files and *mental processes* of lawyers were thereby opened to the free scrutiny of their adversaries. And we refuse to interpret the rules at this time so as to reach so harsh and unwarranted a result.[9]

329 U.S. at 514 (emphasis added).

II. When Counsel's Conduct Fully Complied with the Federal Rules of Civil Procedure and was Otherwise Well Grounded in Fact and Law, the Court of Appeals Exceeded its Authority Under 28 U.S.C. § 1927 in Punishing Him for not Anticipating its Automatic-Notification Rule. The Decision Constitutes a Grave Miscarriage of Justice, Calling for Guidelines that Protect Against the Punishment of Responsible Advocacy, and Calling Also for an Exercise of This Court's Power of Supervision.

In its first opinion, the Court of Appeals based its punishment of counsel on the misconception that his position at trial and on ap-

[9] Counsel did not specifically mention the words "work-product doctrine" in his Verified Petition, since he had not anticipated the Court's revision in rationale, which has brought that doctrine to the fore. He did, however, raise the essence of work product, telling the Court, "having no duty to school Action on the implications of *its* damages claims or *its* burden of proof, he honored his duty, completely within the law and in conflict with no other, to protect his *own* client . . ." (A. 61, emphasis in original).

peal was contrary to his position in the Answer. That misconception was the result of the Court's failure to note that the Complaint and Answer had been specifically confined to the fall breach only. The mistake was explained in detail in counsel's Verified Petition (A. 53-61).

In its second opinion, unlike its first, the Court acknowledged that the pleadings were confined to the fall breach, and that Action had expanded its claim for damages to include the unpleaded spring breach:

> The complaint sought damages for allegedly defective materials furnished in the early fall of 1979. Prior to the pretrial plaintiff expanded its damage claim to include a small amount of goods supplied the preceding spring. [A. 10.]

These critical points had been the focus of Fairhaven's two-page reply brief to the Court of Appeals, filed four months before oral argument (A. 83). Despite the Court's acknowledgment of the points in its second opinion, it refused to withdraw the punishment.

The Court said in its second opinion: "At the very least, and we cannot emphasize this too highly, if notice was considered *no longer admitted* as to the *fall* goods, this would be in *flat contradiction* to an answer which stood unamended" (A. 11, emphasis added). The Court's hypothesis is false; so, therefore, is its conclusion. Contrast what counsel actually said in his Verified Petition:

> . . . To repeat, so that there is absolutely no mistake about it: Fairhaven admitted and continues to admit that as a matter of *fact* it received timely notice on the *September* [fall] items; however, as a matter of *law* under Section 2-607(3)(a), the timely notice on these items became immaterial when it was later revealed that there had been a failure of notice on the *June* [spring] items. Again, see pages 4-14 of Fairhaven's original brief. [A. 58, emphasis in original.]

Cf. *Celotex Corp. v. Catrett*, 54 U.S.L.W. 4775, 4777 (1986) (in the context of discussing Rule 56: "a complete failure of proof concerning an essential element of the . . . party's case necessarily renders all other facts immaterial.")

The Court said that counsel's position on the merits was "[a]t the least . . . frivolous" (A. 12). It also said the following, starting with a quotation out of context from counsel's Verified Petition:

> "[D]espite the timely notice on the *September* items, Action would be barred from *any* remedy," (viz., for the fall items, as well as the spring's). (Emphasis in orig.) As a legal proposition, for which incidentally, defendant cites *no authority*, this seems an *extraordinary position*. The spring goods, and the fall goods, were separate orders, and separate shipments. [A. 11, emphasis on "no authority" and "extraordinary position" added in this Petition.]

The statement that counsel cited "no authority" is patently incorrect. *He cited authority in the very sentence which the Court quotes out of context.* Not once, but twice, counsel said the following in his Verified Petition:

> . . . *By operation of Section 2-607(3)(a),* despite the timely notice on the *September* items, Action would be barred from *any* remedy, because it had not given timely notice on the earlier, *June* items. The rationale is that if Action had given timely notice on the June items — whether or not it later claimed damages on them — Fairhaven could have then taken steps to avert any later problem. See pages 4-14 of Fairhaven's original brief. [A. 56 and 58, emphasis in original on "September," "any," and "June"; emphasis on opening clause added in this Petition.]

Nine times in the Verified Petition counsel cited Section 2-607(3)(a) (A. 53-59). Moreover, pages 4-14 of Fairhaven's original brief, to which the Court was referred three times, is replete with authority for counsel's legal position (A 68-76). The brief not only cites, but quotes, Sections 2-607(3)(a) and 2-714(1) and other pertinent sections of the Code. It also quotes extensively from commentary by Uniform Commissioners and from case law. Yet in the face of all that, the Court said, incredibly, that counsel

had cited "no authority" and that his position was "extraordinary" and "[a]t the least . . . frivolous." It did so, moreover, without even *citing*, let alone discussing, *any* statute, *any* commentary, or *any* case whatsoever on the merits. Repeating a glaring omission from the first opinion, it did not even identify Article 2 of the Uniform Commercial Code as the governing substantive law.

The court based its conclusion that counsel's position was "extraordinary" on its observation that "[t]he spring goods, and the fall goods, were separate orders, and separate shipments." This observation, though accurate, is beside the point. The point is not whether timely notice had been given of breach of a particular *shipment*, viewed in isolation. The point, rather, is whether timely notice had been given of breach of the overall single *contract*, which called for several shipments. See Section 2-612(1)(n.b. Comments 2 and 3).

What matters here, however, is not whether one thinks the preceding substantive contentions of counsel are correct (even though counsel is convinced they are). What matters here is that they are neither "extraordinary" nor "[a]t the least . . . frivolous." Nor are they unreasonable or vexatious. 28 U.S.C. § 1927.[10] They are, rather, based on fact and law and made in good faith. To punish counsel for urging them is egregious. See *Thompson v. City of Louisville*, 362 U.S. 199 (1960); and contrast *Talamini v. All-State Insurance Co.*, 105 S. Ct. 1824 (1985).

The Court's analysis was incorrect not only factually and substantively, but also procedurally. See Argument I. In his Verified Petition, counsel reminded the Court that it was Action, not Fairhaven, which had the burden of proof on notice (A. 57). To support his point, he quoted the same passage from *Eastern Airlines* that appears *supra* at p. 8, and cited the same cases that also appear *supra* at p. 8 (all but one of which had been cited in his original brief) (A. 73-76). See Rule 8(c). Counsel also reminded the Court that it was Action, not Fairhaven, which had taken the case

[10] In its first opinion, the Court based the punishment exclusively on 28 U.S.C. § 1927. In its second opinion, the Court referred to the statute and also to Fed. R. App. P. 38 in citing punishment cases.

outside the pleadings, by adding the unpleaded claim for spring damages (A. 57). See Rule 15(a). Nevertheless, in its second opinion, the Court continued to say nothing about either Rule 8(c) or Rule 15(a). It continued to ignore the fact that Fairhaven had no duty under Rule 8(c) to raise notice as an affirmative defense, nor any duty under Rule 15(a) to amend its Answer.

Also, the Court continued to ignore the permitted practice reflected in the Pretrial Statements of all parties — despite counsel's having stressed that practice in his Verified Petition. Instead, the Court said that the "pretrial statement of disputed issues made no reference to notice" (A. 10). This was misleading. See *supra* pp. 3 and 10. The Court's refusal even to acknowledge counsel's point means that it has outlawed *sub silentio* a pretrial practice which all parties had followed and which the District Court had permitted. The Court of Appeals has made that practice punishable without even explaining to the bar or the District Courts within its circuit just what the practice is. Worst of all, the Court of Appeals has, *ex post facto*, already punished Fairhaven's counsel for following that practice. It has done exactly what Judge Stern speaks against, which bears repeating:

> [D]on't attack the lawyers for doing what the rules allow. If you don't like the rules, change them. But until you do, a lawyer has an absolute duty to do everything for the client that is permitted to be done — and no one has the right to try to frighten the lawyer into giving anything less.

H.J. Stern, *supra*, at p. 21 (1986).

In his Verified Petition, counsel quoted Rule 15(b) at length (A. 57); attached the exhibit which Action had introduced on the spring damages; attached the transcript of part of the cross-examination on the spring damages; and quoted at length the pertinent part of his closing argument at trial (A. 59). All of this, however, was ignored in the Court's second opinion. Though the Court briefly cited Rule 15(b), it did not apply it to the facts. See *supra* p. 13. No authority—neither Rule 15(b) nor anything else —

supports the Court's position that a plaintiff may simultaneously increase its claim for damages while escaping its burden of proof on a contested fact.

The Court similarly ignored another explanation in counsel's Verified Petition. During oral argument, in the context of discussing why the Pretrial Statement had not specifically referred to notice, counsel had begun an explanation saying, "we had a reason for not tipping our hand; one, we —" (A. 67). Counsel was immediately interrupted, and the explanation was never completed. In its first opinion, the Court quoted the statement incompletely, and out of context (A. 16). In his Verified Petition, counsel finished his explanation:

> Fairhaven's reason for not "tipping its hand" to Action — *i.e.*, not specifically telling Action that its own answer to interrogatory on damages had made notice an issue — was part legal and part factual. The legal part was that it had no duty to do so. See pages 6-7 of this Petition [discussing the Pretrial Statement and burden of proof]. The factual part was distrust. Obviously, if there had been a legal duty, distrust would have been no excuse for nonperformance. Here, however, no duty existed: Action, not Fairhaven, had injected the notice issue into the case by claiming damages on the June items, of which Fairhaven had had no prior knowledge; Action, not Fairhaven, had the burden of proof on this injected issue; and Fairhaven had joined the issue by the "Contested Facts" statement of its Pretrial Statement — itself a complete tip of the hand to an opponent that understood its own burden of proof. Though the distrust had many elements (see Fairhaven's original and reply briefs), the heart of it was that Action's president had submitted false evidence in prior litigation. Put in evidence at trial was a 1979 Report of the Master of the Suffolk County (Mass.) Superior Court in an action brought against the president by his former employer (A. __ at 373-448; T.3 at 90-95). The Master found among other things that the president had: (1) *caused a false invoice to be placed in evidence, unbeknownst to his counsel*; (2) directed the payment of bribes or kickbacks; (3) lied to his former employer; (4) given completely incredible testimony; and (5) committed at least thirteen separate breaches of fiduciary

> duty. Fairhaven's counsel feared falsification again; and having no duty to school Action on the implications of *its* damages claims or *its* burden of proof, he honored his duty, completely within the law and in conflict with no other, to protect his *own* client against an opponent with such a past. [A. 60-61, emphasis in original.]

Despite having that full explanation before writing the second opinion, the Court did not disclose it. Rather, it said:

> *In light of the pleadings, and the pretrial silence, it was difficult to think how defendant's counsel could have thought his position with respect to the September goods so obvious that plaintiff's counsel were on actual, as distinguished from possible legal, notice that notice as to these goods was now an issue.* We accordingly inquired as to this during oral argument, and counsel conceded they maintained silence to avoid tipping their hand, in the hope that plaintiff would not try to "fool" them, viz., by offering (false) evidence to meet it. In *other words*, counsel was hoping to fool the plaintiff. This method of trying cases has been *outlawed* in the federal court by the Rules of Civil Procedure since 1940. [A. 11-12, emphasis added.]

The "other words" are the Court's. They are the words of the questioning judge from oral argument (A. 67). They are used unfairly to support a charge that is false, a charge that counsel had engaged in "outlawed" conduct. Counsel's own words, based on fact and showing good faith and lawful conduct, were never revealed.

Three points may be made on the opening sentence of the Court's paragraph. First, as has already been shown, notice on the fall (September) goods was *not* an issue; notice on the earlier, spring goods was. Cf. *Celotex*, 54 U.S.L.W. 4775. This point was made repeatedly in the Verified Petition. Second, as of the time of trial, Action had been litigating its claim for more than three years, a claim rooted in Section 2-714(1), and thus Section 2-607(3)(a). If Action had paid attention to the simple statutory elements of its own claim, then the legal position of Fairhaven's counsel on timely notice of the earliest breach of the contract could only have been "obvious" — "[i]n light of" the actual

pleadings, the actual Pretrial Statements, the actual operation of the Federal Rules of Civil Procedure, the actual facts that Action itself raised during discovery, the actual evidence that Action itself put in at trial, and the actual governing substantive law, which the Court of Appeals never even cited, let alone discussed. Third, this method of trying cases has not been "outlawed . . . by the Rules of Civil Procedure." This method of trying cases complies with those rules. Further, it complies with even deeper principles of jurisprudence: "[T]rial is and always should be an adversary proceeding. [The Federal Rules of Civil Procedure] were hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary." *Hickman*, 329 U.S. at 516 (Jackson, J., concurring).

The final error of the Court of Appeals was of constitutional dimensions. The Court punished counsel for conduct that complied with the established rules, and for advocacy that had express support in the governing substantive law. It did so, moreover, without prior notice of the charges against him, and without any hearing on the charges, either before or after the imposition of punishment. The opinion imposing the punishment was itself counsel's first notice of charges. It required him to pay $2,000 in attorneys' fees and subjected him to unwarranted public humilation. 28 U.S.C. § 1927. This was a violation of due process. See, e.g., *Paul v. Davis*, 424 U.S. 693 (1976); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); *Thompson*, 362 U.S. at 206 ("Just as 'Conviction upon a charge not made would be sheer denial of due process,' so is it a violation of due process to convict and punish a man without evidence of his guilt."); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 161-74 (1951) (Frankfurter, J., concurring). Had the Court honored counsel's right to due process, its misconceptions could have been corrected before it publicly committed itself to acting on them. Cf. *Aetna Life Insurance Co. v. Lavoie*, 54 U.S.L.W. 4381 (1986).

This case presents a grave miscarriage of justice. It demonstrates a genuine need for guidelines that protect against the punishment of responsible advocacy, having in mind not only the underlying

competing values of judicial efficiency and freedom of access to the courts (see *Talamini*, 105 S. Ct. 1824), but also the possibility of judicial mistake. The severe punishment imposed on counsel was totally unjustified. The wrong is only deepened, moreover, by profound limits on redress. Judicial immunity precludes collateral redress. Absence of automatic reviewability may preclude direct redress. Unless this Court grants review, the Court of Appeals will have acted as sole complainant, sole fact-finder, sole judge, and sole appellate reviewer. The Court of Appeals has been, throughout, demonstrably and terribly mistaken. Counsel respectfully draws this Court's attention to the words of Judge Learned Hand:

> "I beseech ye in the bowels of Christ, think that ye may be mistaken." I should like to have that written over the portals of every church, every school, and every court house, and, may I say, of every legislative body in the United States. I should like to have every court begin, "I beseech ye in the bowels of Christ, think that we may be mistaken."

L. Hand, The Spirit of Liberty, Papers and Addresses of Learned Hand, pp. 229-30 (I.Dilliard coll. 1952).

Conclusion

For the foregoing reasons, we respectfully submit that a writ of certiorari should issue to review the judgments and opinions of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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